IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 265 of 1995

For Approval and Signature:

HON'BLE SMT.JUSTICE ABHILASHA KUMARI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Appellant
Versus
MAHMAD SARIF UMAR GAJAL MUSLIM - Respondent

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Appearance :
MR KT DAVE, ADDL PUBLIC PROSECUTOR for Appellant
MR SUNIL C PATEL for Respondent

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CORAM : HON'BLE SMT. JUSTICE ABHILASHA KUMARI

Date : 05/10/2007

ORAL JUDGMENT

1. The present Appeal under Section 378 of the Code of Criminal Procedure, 1973, is directed against the judgment and order dated 31st

December, 1994, rendered by the learned Judicial Magistrate, First Class, Umargam, in Criminal Case No.430 of 1990, whereby the accused (original respondent) has been acquitted for the offences punishable under Sections 297, 304-A of the Indian Penal Code, read with Sections 112, 116 and 117 of the Motor Vehicles Act.

2. Leave to Appeal was granted and the Appeal was admitted by this Court on 7th August, 1996. In the facts and circumstance of the case and with the consent of the learned counsel for the parties, this Appeal is being finally heard and disposed of today.

3. The case of the prosecution, in brief, is that on 23rd December, 1989, the accused Mahmad Sharif Gajal himself went to Umargam Police Station and lodged a complaint to the effect that at about 19:45 hrs., he was driving his tempo bearing registration No.GQO-872 on Sanjan Port road near Captain Bakery in a drunk condition, rashly and

negligently. At that time, a bicycle was coming from the front being driven by Liyakat Abubakar and Yunus Gafur Mulla and the tempo driven by him dashed against the bicycle, due to which both the persons on the bicycle sustained severe injuries on the head and chest and Yunus sustained fracture in his leg. Ultimately, both succumbed to their injuries. The bicycle was also badly damaged.

4. The complaint to the above effect was registered and after recording the statements of witnesses and preparing Panchnamas, a prima-facie case having been found against the respondent, the chargesheet was filed by the investigating officer in the competent Court. After the accused appeared before the Judicial Magistrate, First Class, Umargam, the learned trial Magistrate recorded the statement of the accused at Ex.3 wherein the accused pleaded “not guilty”. Accordingly, the case was put to trial. In support of the case of the prosecution, as many as 12

witnesses were examined. After the recording of evidence of the prosecution witnesses was over, the learned trial Magistrate explained to the accused, the statements appearing against him in the evidence of the prosecution witnesses and recorded his statement under Section 313 of the Code of Criminal Procedure, 1973. The defence of the accused was of total denial and it was stated by him that a false case has been thrust upon him. After having appreciated and evaluated the evidence on record, the trial Court came to the conclusion that it has not been proved beyond reasonable doubt that the respondent was driving the tempo rashly and negligently and recorded a finding of acquittal in favour of the respondent, giving rise to the present Appeal.

5. This Court has heard Mr.K.T.Dave, learned Additional Public Prosecutor for the appellant-State and Mr.Sunil C.Patel, learned advocate for the respondent-accused, at

length and in great detail and has also perused the Record and Proceedings of the case which have been summoned from the trial Court.

6. Mr.K.T.Dave, learned Additional Public Prosecutor has submitted that the judgment and order of the trial Court is contrary to the weight of evidence on record and, further, that the learned Magistrate has erred in acquitting the respondent-accused, although there was ample direct and indirect material evidence to connect him with the crime. Mr.K.T.Dave has emphasized that the trial Court ought to have seen that in this case, the accused himself has gone to the Police Station and lodged the FIR regarding the incident and at that time, and he has admitted that he was driving the tempo rashly and negligently, in a drunken condition. According to the learned Additional Public Prosecutor, the Panchnama of the scene of offence also supports the case of the

prosecution. He has urged that the evidence of the eye-witnesses, PW 4, PW 7, and PW 10, ought to have been believed by the learned Magistrate. On the above grounds, Mr.K.T.Dave has urged that the impugned judgment be set aside and the Appeal be allowed.

7. On the other hand, Mr.Sunil C.Patel, learned counsel for the respondent, has submitted that it has not been proved by the evidence on record that the respondent had been driving rashly or negligently. According to him, the ingredients of Section 304-A, IPC, are not found in the present case against the respondent. He has submitted that the respondent was driving the tempo at a speed of 40 to 50 kms. per hour which cannot be said to be a very fast speed. He has submitted that the evidence of the so-called eye-witnesses is not at all helpful to the case of the prosecution and does not, in any manner, bring out the element of rash and negligent driving or criminal negligence on

the part of the respondent. Mr.Sunil C.Patel has submitted that the Panch Witnesses of the Panchnamas at Exs.5 and 6 have turned hostile and therefore, these Panchnamas have not been proved. According to him, coupled with the contradictions in the evidence of the prosecution witnesses, the case of rash and negligent driving or causing death by negligence has not been proved against the respondent and the trial Court has rightly recorded a finding of acquittal in his favour. He has, therefore, submitted that the Appeal be dismissed.

Mr.Sunil C.Patel has placed reliance on the judgment of this Court titled **State of Gujarat v. Dr.Maltiben Valjibhai Shah** reported in **1993(2) GLR 1600** in support of his submission that the act of the respondent was neither rash nor negligent and the death of the two victims has not occurred due to rashness or negligence shown by the respondent in driving his tempo. He has drawn

the attention of this Court to paragraph-5 of the judgment, which is reproduced below:

"5. A rash act is primarily an overhasty act, and is thus opposed to a deliberate act, but it also includes an act which, though it may be said to be deliberate, is yet done without due care and caution. Illegal omission is act under this section and may constitute an offence if it is negligent. Criminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury, but without intention to cause injury, or knowledge that it will probably be caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted. Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the actor has taken sufficient precautions to prevent their happening. Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that if he had would have had the

consciousness. It is clear, however, that if the words not amounting to culpable homicide are a part of the definition, the offence defined by this section consists of the rash or negligent act not falling under that category, as much as of its fulfilling the positive requirement of being the cause of death. In order to amount to Criminal rashness or Criminal negligence one must find that the rashness has been of such a degree as to amount to taking hazard knowing that the hazard was of such a degree that injury was most likely to be occasioned thereby. The Criminality lies in running the risk or doing such an act with recklessness and indifference to the consequences."

Mr.Sunil C.Patel has also submitted that in an Appeal against acquittal, the appellate Court, although vested with powers to re-appreciate and re-evaluate the evidence, would be slow in reversing the finding of acquittal unless the findings of the trial Court are perverse, contrary to the material on record, palpably wrong, manifestly erroneous or demonstrably unsustainable. He has submitted that there is no such legal infirmity in the judgment under challenge and since the Court should adopt a view favourable to the accused where there is a possibility of two views, the findings of

acquittal recorded by the trial Court may not be disturbed. In support of this submission, he has relied on the principles enunciated in (1) **State of Uttar Pradesh v. Ram Veer Singh and Ors. - 2007(6) Supreme 164** and (2) **State of Gujarat v. Bharatbhai Balubhai Lad and Ors. - 2006(1) GLH 718**.

8. In the above background, having considered the rival submissions of the parties, it is necessary to evaluate and re-appreciate the evidence recorded by the trial Court and the reasons assigned for acquittal by briefly summarizing the salient features of the depositions of the material prosecution witnesses and other relevant evidence on record.

9. PW 4, Nisharbhai Ahmadmiya Umarmiya is an eye-witness and has been examined at Ex.19. This witness states that he is a driver by profession and on the fateful day, at about 7:00 p.m., he was going home from Sanjan Station to the Port in the tempo driven by

the respondent. According to this witness, the respondent was driving the tempo in a drunken condition and he was sitting next to the respondent in the front seat. The speed of the tempo was 40 to 50 kms. per hour and the bicycle, ridden by two persons, was coming from the Port side to the Station. This witness has specifically stated in his examination-in-chief that the tempo was being driven on the left side of the road and the bicycle was coming from the right side when the tempo dashed against the bicycle and both the persons riding the bicycle sustained injuries. This statement has not been dislodged in cross-examination. This witness states that the tempo came to a halt about ten feet away from the spot of accident. The injured persons, namely Liyakat and Yunus were taken to the hospital and at that time, both were alive. In his cross-examination, PW 4 categorically admits that he did not ascertain whether the respondent had consumed liquor or not but he only felt so. He has

further admitted that when he was sitting in the cabin of the tempo next to the respondent, he could not see what took place on the right hand side. He also states that he does not know from which direction the cyclists were coming and in which direction they were going. This witness has stated that on both sides of the road, there was an un-tared portion. He has further stated that due to the pile of crushed stones lying near the turning of the road, he could not see what had transpired. This witness categorically states that both the injured persons fell into the gutter and it was only when the accident took place and there was a loud noise he came to know that the accident had taken place. A perusal of the evidence of this witness, who was sitting in the front seat next to the respondent when the accident took place, does not point out any rashness or negligence on the part of the respondent, due to which the death of the injured persons took place. In the entire testimony of PW 4,

it is nowhere stated that the tempo was being driven in a rash and negligent manner by the respondent. He has clearly stated that it was driven on the left side of the road and at a speed of 40 to 50 kms. per hour. He has also stated that the bicycle was being ridden by two persons and that he could not see clearly what happened on the right side, where the bicycle dashed against the tempo. The evidence of this witness only proves that the respondent was driving the tempo at the time of the accident and this witness was sitting next to him and nothing more than that. The evidence of this witness is, therefore, not at all helpful to the case of the prosecution.

10. Next eye-witness is PW 7, Afsana Abdul Munaf Manjara, who has been examined at Ex.24. This witness states in her cross-examination that at about 7:30 p.m., she was going on foot from Sanjan to the Port side to attend a marriage. She states that the tempo came from

the Port side at a high speed and was about to come upon her but she moved to one side and the tempo dashed against the bicycle being ridden by the two deceased. This witness has stated in her examination-in-chief that she does not know who the tempo belonged to but she has identified the accused as driving the said tempo. In her cross-examination, this witness admits that she is related to deceased Liyakat, being his uncle's daughter. She also states that the tempo was going towards Sanjan Station and this witness was also going in the same direction. This witness further states that the tempo was passing in the same direction in which she was going and after having crossed her, the tempo met with an accident with the bicycle. If the testimony of this witness is examined as a whole, it is nowhere stated that the tempo was being driven in a rash and negligent manner by the accused. Her testimony is also contradictory, inasmuch as that in the examination-in-chief, this

witness states that the tempo nearly dashed into her while she was going to attend a wedding whereas in the cross-examination, she states that the tempo was going in the same direction as she was going and it was only after the tempo crossed her that the accident took place. The evidence of this witness, also, does not lend much support to the case of the prosecution.

11. PW 10, Rafikbhai Dawood Navla, who has been examined at Ex.27, is another eye-witness to the incident. According to this witness, he was seated in the tempo at the time of the accident. He narrates that the accident took place near the turning in the road and it was being driven by the accused at a speed of 40 to 45 kms. per hour. According to this witness, he was seated on the left hand side of the tempo, on the cleaner's side. This witness, in his examination-in-chief, categorically states that he has no knowledge how and in what manner the accident took

place as he was sitting with his head bent down. This witness states that the boys riding the bicycle dashed against the right-hand side of the tempo, on the driver's side, and after the accident took place, the tempo stopped at a distance of five feet from the spot. In his cross-examination, this witness states that a pile of crushed stones was lying on the right hand side at the place of accident and that there was a tree near the spot, as well as a gutter near the road. This witness has also not stated anything regarding rash and negligent driving of the respondent. In fact, he has stated that the tempo was being driven at a speed of 40 to 45 kms. per hour and that he has no knowledge how the accident took place.

12. PW 1, Abdul Rajjak Mahmad Damaniya and PW 2, Abdul Gani Mahmad Saiyed are the Panch witnesses of the Panchnama Ex.5 pertaining to the condition of tempo and Panchnama Ex.6 pertaining to the physical condition of the

accused as to whether he was in a drunken condition or not. Both these Panch witnesses have turned hostile to the case of the prosecution and have not admitted the contents of the Panchnamas. Both PW 1 and PW 2 have been declared hostile and the Panchnamas at Exs.5 and 6 have not been proved.

13. PW 3, Sitaram Mangal Yadav, who has been examined at Ex.9, is the owner of the flour mill near which the accident took place. According to this witness, he was sitting outside his flour mill when he heard the sound of the tempo dashing against the bicycle and rushed to the spot. He states that the accused was driving the said tempo which dashed against the bicycle, ridden by two persons, one of whom sustained injuries on the head and the other on his chest. This witness states that the injured were taken to the hospital in this very tempo and one of them, namely Liyakat succumbed to his

injuries on the way. In his cross-examination, PW 3 states that it was only when he heard the sound of the accident that he rushed to the spot. He states that he has not stated before the Police that the driver of the tempo was the accused. He also categorically admits that when he reached at the spot of accident, the driver of the tempo was not there and he does not know who was driving the tempo. This witness further admits that he has not seen the accident taking place. A perusal of the testimony of PW 3, who is an independent witness, also does not prove that the tempo was being driven rashly or negligently by the accused person. Therefore, the testimony of this witness also does not lend much support to the case of the prosecution.

14. PW 8, Asgari Abubakar Raheman has been examined at Ex.25. He states that the accident took place at a distance of about 500 feet from his house, when he was taking

his meals. He states that when he went to the spot of the accident, no person was present there and he did not see anything there. He further states that he did not see the tempo or the bicycle or any blood stains at the spot of accident. This witness, who is also an independent witness, has been declared hostile to the case of the prosecution. The testimony of PW 9, Shah Mukhtar Gafurbhai Mushtak, at Ex.26 is also of not much help to the prosecution since this witness has not seen the incident.

15. PW 11, Rameshchandra Maneklal Sanjana, has been examined at Ex.28. He has performed the post-mortem of the dead bodies of the deceased. The post-mortem report pertaining to deceased Yunus is at Ex.29 and the cause of death is “Haemorhegic shock following injury to vital organ spleen and fracture Rt. femur”. The post-mortem report of deceased Liyakatali is to be found at Ex.30, wherein, the cause of death is, “head injury”. In his

testimony, PW 11, apart from describing the injuries on the bodies of the deceased, states that on 23.12.1989, the accused was produced before him and he found an odour of liquor coming from the mouth of the accused and pupils of his eyes were unsteady and dilated and he appeared to be under the influence of liquor. This witness further states that the blood of the accused was taken for examination. In his cross-examination, he categorically states that when the bottles of blood were sent for analysis, the prescribed Form-B was not sent along with them. The evidence of PW 11 reveals that the required procedure under the Bombay Prohibition Act was not followed and Form-B was not sent with the samples of blood drawn from the accused. This, coupled with the fact that the Panchnama regarding the physical condition of the accused at Ex.6, has not been proved, does not lend much support to the case of the prosecution regarding the drunken condition of the

accused. PW 12, Abhimajibhai Bhilabhai, who is the investigating officer, has been examined at Ex.33. He has recorded the complaint given by the accused himself, at Ex.34 and prepared the inquest Panchnama and performed the other necessary investigative procedure in the case. PW 5, Valimiya Ahmad Achhu, examined at Ex.20 is the Panch of Inquest Panchnama of deceased Liyakat and PW 6, Adambhai Musabhai Manjara, whose deposition is at Ex.22, is the Panch of the Panchnama of scene of offence. Their testimonies are not of much help to the case of the prosecution.

This, in totality, is the entire oral evidence of the prosecution in the case.

16. A scrutiny of the evidence brought on record by the prosecution as reproduced hereinabove, reveals that what has been brought on record is the fact that an accident took place, that the accused was driving the tempo, the deceased persons were coming on a bicycle

which dashed against the tempo on the right hand side, they sustained injuries and later succumbed to them. A cumulative scrutiny of the entire evidence on record does not point towards rash and negligent driving on the part of the accused. As has been held in **State of Gujarat v. Dr.Maltiben Valjibhai Shah** (supra) to constitute an offence under Section 304-A of the Indian Penal Code, it is necessary for the prosecution to establish that the act of the accused is rash or negligent and by such act the death has occurred and that act does not amount to culpable homicide. In the present case, the prosecution has not been able to prove that the accused was driving the tempo at a very high speed or that he was driving it rashly so as to be negligent in taking due care and caution. In fact, it has come in evidence that the tempo was being driven at a speed of about 40 to 50 kms. per hour. The prosecution witnesses, who were sitting in the tempo at the time of the accident, have nowhere stated

that the accident occurred as a result of the rash and negligent driving of the accused. In fact, the prosecution witnesses, who were sitting in the tempo at the time of accident, have failed to give any satisfactory account of how the accident took place and have only come to know about it when the noise was heard. Even PW Afsana has not stated anything in her testimony, pointing towards the rash and negligent driving of the respondent. The independent witnesses and Panch witnesses have not supported the case of the prosecution. In this view of the matter, it cannot be said that the trial Court has committed any infirmity in recording a finding of acquittal in favour of the accused. Further, the findings of the trial Court cannot be said to be perverse, contrary to the material on record, palpably wrong, manifestly erroneous or demonstrably unsustainable so as to warrant the interference of this Court.

17. However, there is another important aspect of the matter, and that is the fact that the accused has himself lodged the complaint regarding the incident and the FIR has been recorded on the basis of the same. In his complaint, the accused has stated that he was driving the tempo in a drunken condition, at an excessive speed and in a negligent manner, due to which it dashed against the bicycle being ridden by the two deceased, who succumbed to the injuries sustained by them. This amounts to a confession to a Police officer and is not admissible in evidence against the accused, by virtue of Section 25 of the Indian Evidence Act, 1872.

In **Aghnoo Nagesia v. State of Bihar** reported in **AIR 1966 SC 119**, the Supreme Court has enunciated the law regarding the admissibility of confession made to the Police. The relevant part of the judgment is reproduced below:

"(9) Section 25 of the Evidence Act is one

of the provisions of law dealing with confessions made by an accused. The law relating to confessions is to be found generally in Ss. 24 to 30 of the Evidence Act and Ss. 162 and 164 of the Code of Criminal Procedure, 1898. Sections 17 to 31 of the Evidence Act are to be found under the heading "Admissions". Confession is a species of admission, and is dealt with in Ss. 24 to 30. A confession or an admission is evidence against the maker of it, unless its admissibility is excluded by some provision of law. Section 24 excludes confessions caused by certain inducements, threats and promises. Section 25 provides : "No confession made to a police officer shall be proved as against a person accused of an offence." The terms of S. 25 are imperative. A confession made to a police officer under any circumstances is not admissible in evidence against the accused. It covers a confession made when he was free and not in police custody, as also a confession made before any investigation has begun. The expression "accused of any offence" covers a person accused of an offence at the trial whether or not he was accused of the offence when he made the confession. Section 26 prohibits proof against any person of a confession made by him in the custody of a police officer, unless it is made in the immediate presence of a Magistrate. The partial ban imposed by S. 26 relates to a confession made to a person other than a police officer. Section 26 does not qualify the absolute ban imposed by S. 25 on a confession made to a police officer. Section 27 is in the form of a proviso, and partially lifts the ban imposed by Ss. 24, 25 and 26. It provides that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates

distinctly to the fact thereby discovered, may be proved. Section 162 of the Code of Criminal Procedure forbids the use of any statement made by any person to a police officer in the course of an investigation for any purpose at any enquiry or trial in respect of the offence under investigation, save as mentioned in the proviso and in cases falling under sub-s (2), and it specifically provides that nothing in it shall be deemed to affect the provisions of S. 27 of the Evidence Act. The words of S.162 are wide enough to include a confession made to a police officer in the course of an investigation. A statement or confession made in the course of an investigation may be recorded by a Magistrate under S. 164 of the Code of Criminal Procedure subject to the safeguards imposed by the section. Thus, except as provided by S.27 of the Evidence Act, a confession by an accused to a police officer is absolutely protected under S.25 of the Evidence Act, and if it is made in the course of an investigation, it is also protected by S. 162 of the Code of Criminal Procedure, and a confession to any other person made by him while in the custody of a police officer is protected by S. 26, unless it is made in the immediate presence of a Magistrate. These provisions seem to proceed upon the view that confessions made by an accused to a police officer or made by him while he is in the custody of a police officer are not to be trusted, and should not be used in evidence against him. They are based upon grounds of public policy, and the fullest effect should be given to them.

(10) Section 154 of the Code of Criminal Procedure provides for the recording of the first information. The information report as such is not substantive evidence. It may be used to corroborate the informant under S. 157 of the Evidence Act or to contradict him under S. 145 of the Act, if

the informant is called as a witness. If the first information is given by the accused himself, the fact of his giving the information is admissible against him as evidence of his conduct under S.8 of the Evidence Act. If the information is a non-confessional statement, it is admissible against the accused as an admission under S. 21 of the Evidence Act and is relevant, see Faddi v. The State of Madhya Pradesh, Cri.Appeal No.210 of 1963, dated 24-1-1964; (AIR 1964 SC 1850), explaining Nisar Ali v. State of U.P., (S) AIR 1957 SC 366 and Dal Singh v. King Emperor, 44 Ind App 137: (AIR 1917 PC 25). But a confessional first information report to a police Officer cannot be used against the accused in view of S.25 of the Evidence Act."

In the present case, since the FIR has been recorded on the basis of the confession made by the accused to the Police, the incriminating portion thereof cannot be used in evidence against the accused, except as admission of his conduct under Section 8 of the Indian Evidence Act, 1872. If the incriminating portion of the FIR is found to be inadmissible in evidence, then it strikes at the very root of the case of the prosecution since it is hit by Section 25 of the Indian Evidence Act, 1872, and nothing further remains.

18. Lastly, it cannot be lost sight of that this is an Appeal against acquittal and if two views are possible, the one favourable to the accused should be adopted by the Court. In the present case, on the basis of the totality of the evidence, the view taken by the trial Court is plausible, cogent and convincing.

19. In the ultimate analysis, this Court does not find any valid or justifiable ground to interfere with the judgment and order of the trial Court.

For the foregoing reasons, the Appeal is dismissed.

(Smt.Abhilasha Kumari, J.)

(sunil)